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87-864

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1987

City of Woodville, Mississippi, et al., Petitioners,

v.

John Monroe, et al., Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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November 23, 1987

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QUESTIONS PRESENTED

Section 2 of the Voting Rights Act, 42 U.S.C. Section 1973 (b) (1982) provides that a lack of proportional representation is a factor to be considered, but proportional representation is not guaranteed.

The questions presented are:

1. Whether a 65% Black population (and/or a 60% Voting Age Population) constitutes a prima facie "safe district" for minority voters, a question as to which the courts of appeals, and the United States Justice Department, are in conflict?

2. Whether failure of proportional representation of Blacks in Woodville, Mississippi (population 1,512), despite the presence of Black elected and appointed officials, creates a material issue of fact precluding summary judgment for the town, which contains a 64.3% Black population and a 60.5% Black voting age population?

3. Whether a ward system is preferable to at-large elections in a 65/60% Black town of 1,512 total population?

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LIST OF PARTIES

The parties to the proceedings below were the petitioners, The City of Woodville, Mississippi; George J. Gonda, Gary D'Aquilla, Charles James, Andy J. Lewis, Ron Senko, Fred Townsend, George J. Gordon, Joe Townsend, Mary Magee, Herbert Curry, Woodville's City Election Commission, and the respondents, John Moore, Dora Moore, Jimmy Harris, and Larry Johnson.

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TABLE OF CONTENTS

Questions Presented..... i

List of Parties..... ii

Opinions Below..... 1

Jurisdiction..... 1

Statute Involved..... 2

Statement of the Case..... 2

Reasons for Granting the Writ..... 4

I. The Courts of Appeals are in conflict as to whether a voting district composed of 65/60% minority population is a presumptively "safe" district..... 4

II. Failure of proportional representation alone should not defeat summary judgment..... 6

III. Ward Plans may perpetuate, rather that overcome, disproportionate representation..... 7

Conclusion..... 8

Appendix (Opinion and Judgment of Court of Appeals, and Memorandum Decisions of the District Court)

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TABLE OF AUTHORITIES

Cases: *Page Number*

Connor v. Johnson, 402 U.S. 690, 692 (1971)..... 7

James v. City of Sarasota, Fla.,
611 F. Supp. 25 (M.D. Fla. 1985)..... 5

Ketchum v. Byrne, 740 F. 2d 1398,
1410-1417 (7th Cir. 1984), *cert. denied*,
471 U. S. 1135 (1985)..... 4

Latino Political Action Committee, Inc.
v. City of Boston, 784 F.2d 409
(1st Cir. 1986)..... 5

Marshall v. Edwards, 582 F.2d 927,
936 (5th Cir. 1978)..... 5

Monroe v. City of Woodville, MS,
636 F. Supp. 423 (S.D. Miss. 1986),
819 F. 2d 507 (5th Cir. 1987)..... 1

Rybicki v. State Board of Elections of Ill.,
574 F. Supp. 1147, 1149 n. 4 (N.D. Ill. 1984)..... 5

Seastrunk v. Burns, 772 F2d 143
(5th Cir. 1985)..... 5

State of Mississippi v. United States,
490 F. Supp. 569 (D.D.C.) (three-judge panel),
aff'd, 444 U.S. 1050 (1980)..... 5

United Jewish Organizations of Williamsburg,
Inc. v. Casey, 430 U.S. 144, 164 (1977)..... 5

Other Authorities:

42 U.S.C. Sec. 1973(b) (1982)..... i

Howard, Alan and Bruce Howard, "The Dilemma of the Voting Rights Act — Recognized the Emerging Political Equality Norm", *Columbia Law Review,* Vol. 83, No. 7, November, 1983..... V

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

City of Woodville, Mississippi, et al., Petitioners;

v.

John Monroe, et al., Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, the City of Woodville, Mississippi, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the proceedings, John Monroe, et al. v. the City of Woodville, Mississippi, et al., on August 24, 1987.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 819 F.2d 507 (5th Cir. 1987), and is reprinted in the appendix hereto; p. A-1, *infra*.

The memorandum opinion of the United States District Court for the Southern District of Mississippi, Western Division (Barbour, D.J.) is reported at 636 F. Supp. 423 (S.D. Miss. 1986). It is reprinted in the appendix hereto; p. A-11, *infra*.

The Bench opinion of the United States District Court for the Southern District of Mississippi, Western Division (Barbour, D.J.) has not been reported. It is reprinted in the appendix hereto; p. A-15, *infra*.

JURISDICTION

The opinion sought to be reviewed was delivered by the Fifth Circuit on June 5, 1987, and judgment was entered on August 24, 1987.

The mandate as and for judgment respecting petition for rehearing and suggestion for rehearing en banc was entered on August 24, 1987.

Invoking federal jurisdiction pursuant to 42 U.S.C. Section 1973 (J) (f) and 28 U.S.C. Sections 1331, 1343, 1344, 2201 and 2202 for causes of action arising under Section 2 of the Voting Rights Act of 1965, as amended, Pub. L. No. 97-205, Section 3, 96 Stat. 134 (1982), 42 U.S.C. Sections 1981, 1983 and 1985 and the Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution, the Respondents John Monroe, et al., brought this suit in the Southern District of Mississippi on May 1, 1985. On June 10, 1986, the Southern District granted Petitioners' Motion for Summary Judgment. See p. A-11, *infra*.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTE INVOLVED
SECTION 2 OF THE VOTING RIGHTS ACT

42 U.S.C. Section 1973 (b) (1982): A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivion is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

STATEMENT OF THE CASE

The City of Woodville, Mississippi, is a majority Black town. From data derived from the last national census

(1980), the total population of the City is 1,512. Of that number 972 citizens are Black (64.3%) and 540 are white (35.7%). With respect to the voting age population of those age 18 or over (the "VAP"), there are 632 Black (60.5%) and 412 white (39.5%) citizens. The mayor and four (4) city aldermen are elected at-large. One of the four aldermen currently serving is Black. He was first elected in 1981, was re-elected in 1985, and has served independently of the effects of this current litigation.

On May 1, 1985, John Monroe and other named Plaintiffs filed this, their Voting Rights action, against the City of Woodville, Mississippi, and certain elected officials thereof, seeking a declaration that the at-large election scheme of the City was illegal. The action further sought a Court-ordered plan for aldermen to be elected by wards. Additionally, a temporary injunction was sought to enjoin the then upcoming May 14, 1985, municipal elections.

On May 3, 1985, Plaintiffs filed a Motion for a Temporary Restraining Order and/or Preliminary Injunction. After an evidentiary hearing held on May 13, 1985, the United States District Court overruled Plaintiffs' Motion for Temporary Injunctive Relief.

After the discovery time had elapsed as set by an Amended Scheduling Order, the town filed their Motion for Summary Judgment asserting that this action should be dismissed because of Woodville's 64.3% Black population and 60.5% Black voting age population. A Response to that Motion was filed by Respondents. The town filed a Motion to Strike many of the affidavits filed in response as being inadmissible for summary judgment purposes.

Only two basic sets of facts are germaine. First, Woodville is a small town with a 1980 population of 1,512. The census data establish that population. Second, the Black population of Woodville is 64.3% and the Black voting age population is 60.5%. These data are not challenged by the Respondents, and therefore are conclusive for the purposes offered here.

The Respondents presented absolutely no factual matter which could create an issue of fact that these population data do not create a traditional "safe" district within the city limits of Woodville, Mississippi. There is nothing of record setting forth any factor which would tend

to demonstrate that any sociological and/or electorial characteristic of the Black population in Woodville or political attitude in Woodville which would indicate the need for more than a traditional "safe district" for a voting rights remedy. These factors might include impediments to voters' exercise of the franchise, or proof of low Black voter registration and low Black voter turnout.The Plaintiffs did not place into the record any evidence whatsoever that would tend to prove why Blacks of voting age would not be able to vote.

The Fifth Circuit found that, in response to interrogatories, the City of Woodville indicated that since 1969 in at-large elections for the four (4) aldermanic seats, Blacks had been elected only in 1981 and 1985. The same Black candidate was elected in both elections. The City of Woodville maintains that Blacks did run for office during the other elections and Blacks do serve in appointed city positions. The Fifth Circuit held, however, that the failure of Woodville to achieve proportional representation of Blacks created a material issue of fact, defeating summary judgment.

REASONS FOR GRANTING THE WRIT

I.
THE COURTS OF APPEALS ARE IN CONFLICT AS TO WHETHER A VOTING DISTRICT COMPOSED OF 65/60% MINORITY POPULATION IS A PRESUMPTIVELY "SAFE" DISTRICT.

In the instant case, the Fifth Circuit panel held that the mere fact that Woodville, Mississippi, population 1,512, 64.3% Black and 60.5% Black voting age population, had in the past 16 years elected only one (1) Black alderman in two (2) elections, at-large, created a material issue of fact precluding the District Court's summary judgment. This holding is in conflict with the Seventh Circuit which has endorsed the use of the 65/60% standard for a prima facie case of a "safe" minority district. *Ketchum v. Byrne,* 740 F.2d 1398 (7th Cir. 1984), *cert. denied,* 471 U.S. 1135 (1985).

The District Court had held that Woodville's Black population was sufficiently numerous, based upon the record before the District Court, to constitute a "safe

district" that could not dilute Black voting strength. The panel opinion responded by defining a "safe district" as "...nothing more or less than an electoral district in which a majority of the residents shares a politically significant characteristic or interest, and that majority is sufficiently large to make it likely that the district will elect a representative with the same characteristic or interest." 819 F.2d 507, 510 (5th Cir. 1987).

The remedy for the "correction of historic racial discrimination" in the voting rights context is the creation of such an "effective minority" within a particularized voting unit. *Marshall v. Edwards,* 582 F.2d 927, 936 (5th Cir. 1978). See also, *Ketchum v. Byrne,* 740 F.2d 1398, 1410-1417 (7th Cir. 1984), *cert. denied,* 471 U.S. 1135 (1985). These "effective minorities" also are know as "safe districts." *Seastrunk v. Burns,* 772 F.2d 143 (5th Cir. 1985), Howard, Alan and Bruce Howard, "The Dilemma of the Voting Rights Act - Recognizing the Emerging Political Equality Norm," *Columbia Law Review,* vol. 83, No. 7, November, 1983, p. 1615.

Over the years, a rule of law has developed that "absent extraordinary circumstances, a 65% black population and/or 60% black voting age population is a safe district." *State of Miss. v. U.S.,* 490 F.Supp. 569, 575 (D.D.C.) (three-judge panel) *aff'd* 444 U. S. 1050 (1980), *Ketchum v. Byrne, supra,* 740 F.2d at 1415-1417 (7th Cir. 1984 [collecting cases]). The rule of law developed from two (2) sources. First, the 65%/60% has been generally required by the United States Attorney General for Section 5 preclearance purposes. *United Jewish Organization of Williamsburgh, Inc. v. Casey,* 430 U. S. 144, 164 (1977), *Latino Political Action Committee, Inc. v. City of Boston,* 784 F.2d 409 (1st Cir. 1986). *Rybicki v. State Board of Elections of Ill.,* 574 F. Supp. 1147, 1149 n. 4 (N.D. Ill. 1984), *James v. City of Sarasota, Fla.,* 611 F. Supp. 25 (M.D. Fla. 1985). Second, expert witnesses formulated the rule by augmenting a 50% "majority" with these additional factors: (1) plus 5% for younger Black population; (2) plus 5% for lower Black voter turnout, and (3) plus 5% for lower Black voter registration. The 65%/60% benchmark or presumption should be utilized, absent independent evidence of necessary

correctives, for any of the three (3) 5% factors. These correctives generally are given by expert testimony. *Ketchum, supra.* The Seventh Circuit, for example, has endorsed and required the use of these three (3) corrective factors, *Ketchum, supra,* while the Fifth Circuit has disallowed the 65/60% rule of thumb in the decision here presented for review.

In response to Woodville's Motion for Summary Judgment, the Plaintiffs adduced absolutely no evidence that in any way would rebut any of the 5% correctives for age, voter turnout and voter registration. The only evidentiary matter filed in opposition to Defendants' Motion to Dismiss or Motion for Summary Judgment consisted of (1) Defendants' Response to Plaintiffs' First Interrogatories; (2) an affidavit by one Louis E. Armstrong that in his opinion Woodville is "sufficiently racially concentrated so as to be divided into wards for the purpose of electing aldermen"; (3) affidavits of several residents alleging the conclusion that Woodville's at-large election system discriminates against Blacks as well as dilutes Black voting strength; (4) a petition signed by citizens, also a conclusion, stating that they believe the at-large elections discriminate, and (5) a supplemental affidavit by Louis E. Armstrong, stating that "...Woodville is so sufficiently concentrated that the city could easily elect aldermen from four ward districts, with at least three of the districts having a predominately Black population of 87%, 70.2% and 58.9%, respectively." Mr. Armstrong's affidavit annexes a map of the City and proposed ward districting plans. There is nothing in the record that is relevant to the issue of why more than the traditional 65% "safe district" must be employed.

II.
FAILURE OF PROPORTIONAL REPRESENTATION ALONE SHOULD NOT DEFEAT SUMMARY JUDGMENT.

In reversing the District Court, the panel held that the absence of elected Black officials, in itself, created a material issue of fact that precluded the District Court's

summary judgment finding of a "safe district."

The procedural impact of the panel opinion will be far-reaching. District Courts in this circuit can no longer utilize the 65%/60% rule. By merely pointing to the non-election of Black officials in units of government, no matter how large the Black population, without more, Plaintiffs will create a fact issue that will require extensive and expensive evidentiary hearings requiring expert testimony. Additionally, the 65%/60% standard of the United States Attorney General in Section 5 evaluations will not apply to Section 2, even presumptively, thereby creating a dissonance between Section 5 preclearance and Section 2 that will spawn more extensive litigation.

The Plaintiff class in Woodville never was certified. Other minority citizens may file other Section 2 challenges, if they wish. The instant Respondents did nothing to rebut the presumed safe district.

The panel's rule of law that the non-proportional election of Blacks, alone, creates a material issue of fact approaches the requirement of a proportional representation of minorities, forbidden by the Voting Rights statue itself. 42 U.S.C. Section 1973(b) (1982). The potential for disruption created by the panel opinion is unnecessary. The utilization of the established 65%/60% benchmark and the requirement of a true issue of fact to avoid the application of that benchmark percentage comports with existing law and alleviates unnecessary expense and litigation. If there are factors truly associated with lower Black voter turnout and lower Black voter registration that would justify increasing the traditional 5% corrective for those issues, Plaintiffs may submit that information into the record and easily defeat a motion for summary judgment. The Respondents here did not meet their burden.

III.
WARD PLANS MAY PERPETUATE, RATHER THAN OVERCOME, DISPROPORTIONATE REPRESENTATION.

The general rule has developed that ward plans are to be favored over multi-member districts. *Conner v. Johnson,*

402 U.S. 690, 692 (1971) (per curiam). The circumstances of Woodville, Mississippi, however, present a virtual *reducio ad absurdum* of that rule. Instead of a single multi-member district of 60.5% Black voting age population, the town would be composed of two (2) "packed" wards of 87% and 72% Black population, one (1) "impact" ward of only 58.9% Black population, and one (1) presumptively white ward. Conceivably, such a ward system would elect two (2) Black aldermen, two (2) white aldermen, and a white mayor, perpetuating white dominance, while a 65/60% Black population in a Black multi-member district might gain control of all city offices.

CONCLUSION

This Court should grant certiorari to hear this case, and should reverse the Fifth Circuit precedent that is an ill-advised effort toward requiring proportional minority representation, and in conflict with the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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November 23, 1987

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-4414

JOHN MONROE, ET AL.,

Plaintiffs-Appellants,

v.

CITY OF WOODVILLE, MS., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi
(June 5, 1987)

Before REAVLEY and RANDALL, Circuit Judges, and WOODWARD,* District Judge.

PER CURIAM:

Plaintiffs appeal the district court's grant of summary judgment against and dismissal of their claim that their voting rights are violated by the defendant city's electoral system, which allegedly dilutes the voting strength of blacks. We reverse the judgement entered by the district court and remand for further proceedings.

*District Judge of the Northern District of Texas, sitting by designation.

I.

According to the 1980 national census, the defendant City of Woodville, Mississippi ("the city") has a population of 1,512 residents. Of the city's voting-age population of age 18 or older, 632 residents are black (60.5%) and 412 residents are white (39.5%). Despite the numerical superiority of voting-age blacks in Woodville, black candidates have been noticeably unsuccessful in their attempts to win municipal office. since 1969, sixteen black candidates have run for positions on the city's four-member board of aldermen. Yet a black candidate has won a position on the board of aldermen only twice, although at least two

black candidates have run for alderman in each municipal election since the enactment of the Voting Rights Act in 1965. This sole black alderman was elected in 1981 and reelected in 1985. The lack of success of black candidates in winning aldermanic elections is reflected in the electoral results of races for other municipal offices.

The city's aldermen, like other elected city officials, are elected on an at-large basis. At all times relevant to this appeal, the Mississippi Code proscribed single-shot voting; that is, if an elector voted for less candidates than the number of positions in that office to be filled by the at-large election, his ballot would be void under Mississippi law as to any candidate for whom he voted. See 1950 Miss. Laws ch. 491, § 66 (formerly codified at Miss. Code Ann. § 21-11-15 (1972)), repealed by 1986 Miss. Laws ch. 495, § 329; see also City of Rome v. United States, 446 U.S. 156, 184 n.19 (1980) (explaining the potentially dilutory effects of an anti-single-shot provision upon minority voting strength in an at-large electoral system).

Early in May of 1985, the plaintiffs, four blacks registered to vote in Woodville, filed a complaint seeking to certify a class of similarly situated individuals and demanding injunctive relief against the city under section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, the thirteenth, fourteenth, and fifteenth amendments to the United States Constitution, and 42 U.S.C. §§ 1981, 1983 & 1985. Plaintiffs alleged that the city's at-large electoral system diluted black voting strength and thereby violated their rights under the above-mentioned constitutional amendments, and also violated section 2 of the Voting Rights Act. Plaintiffs asked the district court to divide the city's at-large electoral system into a single-member electoral districts, in order to avoid the dilutory effects of the at-large electoral system.

After almost a year of discovery, the city filed a motion for summary judgment. In its motion, the city took the peculiar stance of conceding liability on the merits for the purposes of that motion, but argued nonethelesss that the plaintiffs were not entitled to a remedy: because blacks already constitute a 60.5 percent majority of the voting age population of Woodville, they "accordingly currently

possess any remedy they might receive pursuant to .... Section 2 of the Voting Rights Act." Monroe v. City of Woodville, No. W85-0088(B) (S. D. Miss. Apr. 1, 1986) (motion for summary judgment). Since, the city's argument proceeds, the plaintiffs already possess the remedy sought, there exists no genuine issue of material fact and the city is entitled to judgment as a matter of law.

The district court agreed, and granted the city's motion. The court found that "[t]he salient fact of the matter is that under the current system, Blacks are not only in the majority but that the City of Woodville as a whole is a 'safe' district where Blacks constitute, as a matter of law, an effective majority of the voting age population." Monroe v. City of Woodville, 636 F. Supp. 423, 424 (S. D. Miss. 1986) (emphasis in original). Citing the Seventh Circuit's careful analysis of appropriate remedies to minority vote dilution in Ketchum v. Byrne, 740 F2d. 1398 (7th Cir. 1984), cert. denied, 471 U. S. 1135, 105 S. Ct. 2673, 86 L. Ed. 2d 692 (1985), the district court noted that federal courts have widely accepted that a 60 percent majority of the voting age population in a given district provides minorities a fair opportunity to pariticipate in the political process and to elect a candidate or candidates of their choice. Since blacks already constitute 60 percent of the city's voting age population, "any remedial action from a federal court abolishing or modifying the at-large system would be presumptively inappropriate." Monroe, 636 F. Supp. at 424. The court further pointed out that "[t]he meager evidentiary materials submitted ... in repsonse to Defendants' Motion do not contain specific facts which point to any "built-in" bias or to any purposeful discrimination regarding Woodville's at-large system of electing aldermen." Id. at 425. The court therefore entered jugment in favor of the city, and this appeal followed.

II.

A grant of summary judgment under Federal Rule of Civil Procedure 56 is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," when viewed in the light most

favorable to the party opposing the motion, "show that there is no genuine issue as to any material fact and that the moving party is entiteld to a judgment as a matter of law." Fed. R. Civ. P. 56(c); e.g. Phillips Oil Co. v. OKC Corp, 812 F. 2d 265, 272 (5th Cir. 1987). A federal appellate court, on appeal from a summary judgment, reviews the record according to the same legal standard as the district court in determining whether the entry of summary judgment was warranted. Id.

The Supreme Court has recently instructed that, where the nonmovant would bear the burden of proof at trial, the party moving for summary judgment has the burden, not of producing evidence demonstrating the absence of a genuine issue of material fact, but of "'showing' — that is, pointing out to the District Court — that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2554 (1986). In the instant case, the sole basis for the city's motion was its theory that, even conceding liability on the merits, the plaintiffs were not entitled to a remedy because blacks already constituted a significant majority of the city's voting age population. Because the district court rested its decision upon the city's theory and not upon an independent legal basis for summary judgment, cf. id. (district courts empowered to grant summary judgment sua sponte), our review of this appeal is necessarily limited to the sole ground for judgment upon which the city met its burden of identification: that is, its theory that the plaintiffs already possess the remedy sought.

A violation of the Voting Rights Act of 1965, as amended, is established "if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by ... [minority] citizens ... in that [such citizens] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973. Thus, in conceding a violation of the Act for the purposes of its motion, the city stipulates that its electorial processes are not equally open to blacks and that blacks have less

opportunity than whites to participate in the political process and elect representatives of their choice.

The city nonetheless contends that, even though arguendo it deprives blacks of their right to participate equally in the political process, the substantial black majority of Woodville's voting-age population prevents the district court from ordering relief under the Act. The city points out that federal courts have widely accepted that, absent extraordinary circumstances, an electoral district in which minorities comprise 60 percent of the voting-age population should be considered a "safe" district where minorities have a reasonable chance of electing a candidate who will respond to their needs. See, e.g., Mississippi v. United States, 490 F. Supp. 569, 575 (D.D.C. 1979) (three-judge panel), aff'd, 444 U.S. 1050 (1980). Since blacks already comprise 60 percent of Woodville's voting age population, the city argues, Woodville should be considered a black "safe" district unless sociological, electoral, or political information indicates that a large black majority is required. Cf. Ketchum v. Byrne, 740 F.2d 1398, 1415-16 nn.20 & 21 (7th Cir. 1984) (indicating that 60% voting age population norm should be adjusted upward or downward when the facts so warrant), cert. denied, 471 U.S. 1135 (1985). Yet, the city continues, the plaintiffs have failed to produce any evidence that a greater black majority would be necessary to create a safe district of Woodville, and therefore have failed to rebut the city's motion for summary judgment.

We find the city's concession of a violation of the Voting Rights Act to be both logically and factually inconsistent with its stance that Woodville is already a safe district. Our review of the usage of the term "safe district" in the relevant jurisprudence has convinced us that the term signifies nothing more or less than an electoral district in which a majority of the residents shares a politically significant characteristic or interest, and that majority is sufficiently large to make it likely that the district will elect a representative with the same characteristic or interest.[1]

[1] See, e. g., Thornburg v. Gingles, 106 S. Ct. 2752, 2785, 2787 (1986) (describing as a "completely safe district" a district in "which blacks would constitute an overwhelming majority. The black voters in this district would be assured of electing a representative of their choice." (O'Connor,

J., concurring in the judgment); Davis v. Bandemer, 106 S. Ct. 2797, 2809-10 (1986) ("To draw district lines to maximize the representation of each major party [in the Indian Legislature] would require creating as many safe seats for each party as the demographic and predicted political characteristics of the State would permit. This in turn would leave the minority in each safe district without a representative of its choice. We upheld this 'political fairness' approach in Gaffney v. Cummings, despite its tendency to deny safe district minorities any realistic chance to elect their own representatives."); Whitcomb v. Chavis, 403 U. S. 124, 156 (1971) ("The District Court's holding ... is expressive of the more general proposition that any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represents a majority living in an area sufficiently compact to constitute a single-member district. This approach would make it difficult to reject claims of Democrats, Republicans, or members of any political organization ... who live in what would be safe districts in a single-member district system but who in one year or another, or year after year, are submerged in a one-sided multi-member district vote.") (footnotes omitted); Seastrunk v. Burns, 772 F.2d 143, 149, 151-52 (5th Cir. 1985) ("Second, appellants alleged that an only 65 percent black voting majority within district 1-D was sufficient to ensure its "safety" as a black seat on the Board: the 'excess' 25 percent of the black population within that district would thus have been put into a second, albeit not "safe," district, giving the black voters of the Parish more leverage in School Board elections.") (footnote omitted); Marshall v. Edwards, 582 F.2d 927, 931 (5th Cir. 1978) ("'Our plan does provide for four districts, basically six, seven, eight and nine with black majorities respectively 86%, 99%, 64% and 93%. These four seats, by rule of thumb and practical application and knowledge, would be considered safe districts for the minority group in this parish.'") (quoting trial testimony of expert witness), cert. denied, 442 U.S. 909 (1979); see also Howard & Howard, The Dilemma of the Voting Rights Act — Recognizing the Emerging Political Equality Norm, 83 Colum. L. Rev. 1615, 1615 (1983) ("A safe district is a district in which a large majority of the residents shares a certain politically significant characteristic or interest, thereby making it likely that the district will elect a representative with the same characteristic or interest.").

As the Seventh Circuit implicitly acknowledged in Ketchum, the question of the size of the majority necessary to ensure the likelihood of minority success at the polls cannot be determined by a set formula, but must be evaluated on a case-by-case basis according to the political and other characteristics of the relevant population. See 740 F. 2d at 1415-16 nn. 20 & 21.

We find it fundamentally provides blacks less opportunity than whites to participate in the political process and elect representatives of their choice, yet at the same time to insist that blacks in Woodville are likely to elect the representative of their choice. The one fact that is clear on the meager record before us is that black candidates are

unlikely to be elected to office in Woodville. Interpreted in light of the city's limited concession of a violation of section 2 due to dilution of black voting strength, this lack of success at the polls must be regarded, not as happenstance, but as the result of the city's electoral structure operating in conjunction with significant white bloc voting, and in spite of the existence of a politically cohesive black community which is sufficiently large and compact to constitute a majority in a single-member district. See Thornburg v. Gingles, 106 S. Ct. 2752, 2766-67 (1986) (setting forth elements of section 2 violation where dilution of minority votes by at-large system alleged). Viewed in the light most favorable to the plaintiffs, this record reveals a genuine issue of material fact as to whether Woodville, as presently constituted, is a safe district in which blacks are likely to elect the representatives of their choice.[2]

[2] Moreover, there is strong evidence that Congress intended that, where a violation of the Act is established, courts should make an affirmative effort to fashion an appropriate remedy for that violation. The legislative history to the 1982 amendments to the Voting Rights Act states that:

> The basic principle of equity that the remedy fashioned must be commensurate with the right that has been violated provides adequate assurance, without disturbing the prior case law or prescribing in the statute mechanistic rules for formulating remedies in cases which necessarily depend upon widely varied proof and local circumstances. The court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice.

S. Rep. No. 417, 97th Cong., 2d Sess. 31, reprinted in 1982 U.S. Code Cong. & Admin. News 177, 208 (footnote omitted). This counsel from the legislative history strengthens our conviction that, on this record, the district court's granting the city's motion for summary judgment was improper.

In its memorandum opinion and order, the court below, as an aside, intimated that the small physical size and population of Woodville might render impracticable the further division of that political body into single-member districts. On appeal, the city has not pursued this line of reasoning as an independent ground for affirming the district court's judgment. Given the meager record before us, we are in no position to address the merits of such a fact-specific argument.

III.

For the reason discussed above, the judgment entered by the district court is REVERSED and this case is REMANDED for further proceedings.

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK
August 24, 1987

GILBERT F. GANUCHEAU
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

Mr. Clarence A. Pierce, Clerk
U. S. District Court
245 E. Capital St., Rm. 418
Jackson, MS 39201

No. 86-4414 - Monroe, et al. - vs - City of Woodville, MS, et al.
USDC# CA-W-85-0088-B

☒ XX Enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

☐ Enclosed to you only is a certified copy of the Rule 47.6 Decision in the above case issued as and for the mandate.

☐ The Court having denied the motion for stay of mandate, enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

☐ Having receiving from the clerk of the Supreme Court a copy of the order of that Court denying certiorari, I enclose a certified copy of the judgment of this Court in the above case, issued as and for the mandate.

☐ We have received a certified copy of an order of the Supreme Court denying certiorari in the above cause. This Court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

☒ Copy of the Court's opinion.

☒ Original record on appeal or review. 4 Volumes.

☒ Other original papers forwarded with record. 1 Envelope ___ Box.

☐ Bill of Costs approved by this Court. ☐ Copy enclosed to counsel.

cc: (Letter Only)
Hon. William H. Barbour
Mr. Willie L. Rose
Ms. Deborah A. McDonald
Mr. Richard T. Watson
Mr. Dennis L. Horn

Sincerely,
GILBERT F. GANUCHEAU, Clerk

By: /s/ Karen L. Comeaex
Deputy Clerk

MDT-1

Rev. 10/86

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-4414

U.S. COURT OF APPEALS
FILED
AUG. 24, 1987

GILBERT E. GANUCHEAU
CLERK

JOHN MONROE, ET AL.,

Plaintiffs-Appellants,

versus

CITY OF WOODVILLE, MISSISSIPPI, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Mississippi

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion June 5, 1987, 5 Cir., 198_, _____F,2d_____)

(August 24, 1987)

Before REAVLEY and RANDALL, Circuit Judges, and WOODWARD,* District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED. The mandate shall issue forthwith.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

*District Judge of the Northern District of Texas, sitting by designation.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

Carolyn Dineen Randall
United States Circuit Judge REHG-6

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

JOHN MONROE, ET AL. PLAINTIFFS
VS. CIVIL ACTION NO. W85-0088(B)
CITY OF WOODVILLE, MS., ET AL. DEFENDANTS

MEMORANDUM OPINION AND ORDER

Presently before the Court for disposition in this Voting Rights Act case is Defendants' Motion for Summary Judgment. The case presents the straight-forward question of whether at-large elections for city aldermen violate the "results" standard of Section 2 of the Voting Rights Act where black voters constituted a pre-existing effective majority of the electorate.

According to the 1980 census, the City of Woodville, Mississippi, has a population of 1,512 residents. Of this population, 972 residents are black (64.3%), and 540 residents are white (35.7%). With respect to voting age population of age 18 or over ("VAP"), there are 632 Blacks (60.5%) and 412 whites (39.5%). The five city aldermen are elected at-large. One of the five aldermen currently serving is black.

Notwithstanding this uncontroverted statistical evidence, Plaintiffs, duly qualified, black electors of Woodville, nevertheless contend that the City of Woodville's current at-large method of electing its four aldermen has the result of diluting black voting strength in violation of Section 2 of the Voting Rights Act, as amended, 42 U.S.C.A. §1973 (Supp. 1985) and of the Constitution.

It is clear from the Complaint and from the briefs of

Plaintiffs in response to the Motion for Summary Judgment, that the thrust of their suit is that the at-large election plan has the result of diluting black voting strength in violation of Section 2 of the Voting Rights Act and of the Fourteenth and Fifteenth Amendments to the Constitution. They allege the well-known White-Zimmer factors referred to by the Senate Judiciary Committee report on the 1982 Amendment to the Voting Rights Act, S. Rep. No. 417, 97th Cong., 2d Sess. at 28-29, reprinted in 1982 U. S. Code Cong. & Ad. News 177 (1982), which must be considered by the Court in applying the results test mandated by Section 2, as amended.

However, even assuming that the Plaintiffs will prevail on each of those factors and giving no weight to the fact that a Black has been elected under the at-large plan, we think that the population proof offered by Defendant negates a prima facie case of the dilution of minority votes in the City of Woodville's at-large system of electing Aldermen. The salient fact of the matter is that under the current system, Blacks are not only in the majority but that the City of Woodville as a whole is a "safe" district where Blacks constitute, as a matter of law, an effective majority of the voting age population. As noted initially, Blacks comprise 64.3% of the total population of the City and 60.5% of the voting age population. In the remedial context, a black VAP of 60%, or a black percentage of the total population of 65% or more, has achieved standard acceptance in the federal courts as providing a fair opportunity for Blacks to participate in the political process and elect a candidate or candidates of their choice. See generally Ketchum v. Byrne, 740 F.2d 1398, 1415-17 (7th Cir. 1984) (collecting cases). As stated in State of Mississippi v. United States, 490 F. Supp. 569, 575 (D.D.C. 1979) (three-judge panel), aff'd, 444 U.S. 1050 (1980):

> [i] has been generally conceded that, barring exceptional circumstances such as two white candidates splitting the vote, a district should contain a black population of at least 65 percent or a black VAP of at least 60 percent to provide black voters with an opportunity to elect a candidate of their choice.

With respect to elections held on an at-large basis in the City of Woodville, both the 60% VAP and, in essence, the 65% total population requirements, are met. Accordingly, we hold that a "minority" voting dilution claim cannot stand and that any remedial action from a federal court abolishing or modifying the at-large election system would be presumptively inapproriate.[1]

Other than several affidavits which are manifestly of a conclusory nature and are insufficient, the only evidentiary materials submitted by Plaintiffs to the Court in opposition to Defendant's Motion are the City's responses to certain portions of Plaintiff's First Set of Interrogatories and two plans proposed by Plaintiffs which would divide the City of Woodville into five, or four, single-member aldermanic districts.[2] The answers to interrogatories submitted to the Court demonstrate that Blacks have unsuccessfully run for Alderman in Woodvillle, and that only one Black, who currently serves, has been elected to that office. Where, as here, black voters have a pre-existing effective majority, the mere fact that elections have been lost by black candidates, or that proportional representation has not been achieved, does not, standing alone, warrant the exercise in "political engineering" sought by Plaintiffs in the instant case. See Terrazas v. Clements, 581 F. Supp. 1329, 1358-59 (N. D. Tex. 1984) (three-judge panel). As observed in a slightly different contest by the panel in Terrazas:

[1] This case is clearly distinguishable from Jordan v. City of Greenwood, 599 F. Supp. 397 (N.D. Miss. 1984), which is heavily relied upon by Plaintiffs. In Greenwood, Blacks composed only a bare majority of the total population (52.0%) and, more importantly, only 46.2% of the voting age population. 599 F. Supp. at 400. Thee was no pre-existing effective majority in that case, and no Black had ever been elected to the City Council under at-large voting.

[2]The proposed five-ward plan would have black population percentages of 96.6%, 81.0%, 21.3%, 68.2%, and 46.4%. The proposed four-ward plan would have black population percentages of 87.0%, 70.2%, 58.9% and 41.4%. In general terms, the five-ward plan would result in three "packed," or concentrated, black districts, and one "impact" district in which black voters could exercise a significant influence upon the outcome of an election. The four-war plan would result in two "packed" and two "impact" districts.

[w] here the absence of proportional representation results simply from the loss of elections rather than a "built-in bias" against a minority group, that group's voting strength has not been "cancelled out" in any constitutional sense. Whitcomb v. Chavis, 403 U. S. at 152-53, 91 S. Ct. at 1873-74. The same result obtains under the section 2 test unless the courts attach no meaning either to the Congressional caveat against proportional representation, 42 U.S.C.A. §1973 (b), or to the explicit codification of pre-Bolden law.

Id. Accord, Seastrunk v. Burns, 772 F.2d 143, 154 (5th Cir. 1985). The meager evidentiary materials submitted to the Court in response to Defendants' Motion do not contain specific facts which point to any "built-in" bias or to any purposeful discrimination regarding Woodville's at-large system of electing aldermen. Accordingly, judgment in Defendants' favor is appropriate with respect to Plaintiffs' constitutional and Section 2 claims.

Finally, while this Court is not called upon to decide whether the principle decided here is applicable to large municipalities, the Court does observe that, in a town with a population of approximately 1,500 and a physical area commensurate thereto, a district composed of the entire area of the town and of its entire population is not of such a size which would result in Blacks having less opportunity to participate in the political process or elect representatives of their choice. Indeed, it can be effectively argued from a non-legal standpoint that at-large elections under which each alderman will be answerable to and accessible to the entire electorate will produce a more responsive government to the needs of individual citizens than would a ward system.

For reasons stated herein, the Defendants' Motion for Summary Judgment is sustained and it is ordered the Complaint is dismissed with prejudice. A separate judgment will be entered by the Court.

ORDERED this the 10 th day of June, 1986.

William H. Barbour, Jr.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

JOHN MONROE, et al.

v. CIVIL ACTION NO. W-85-0088(B)

CITY OF WOODVILLE, MISSISSIPPI, et al.

ROBERT PATTERSON, et al.

v. CIVIL ACTION NO. W-85-0089(B)

CITY OF CENTREVILLE, MISSISSIPPI, et al..

RULING OF THE COURT

BEFORE: The Honorable William H. Barbour, Jr.,
United States District Judge

DATE: May 13, 1985

PLACE: Jackson, Mississippi

DAVID A. SCOTT
COURT REPORTER
Post Office Box 2202
Jackson, Mississippi 39225-2202

BY THE COURT:

The court has considered both of these cases. Both of these cases have appeared before the court on motion for temporary restraining order. This is May 13, 1985. Municipal elections in all towns and cities in the State of Mississippi by law have been scheduled for tomorrow, May 14, 1985. Those municipal elections are at this point on party primaries for the selection of the party candidates to run in the municipal elections which are set by law to be held

in June of this year. The Complaints in these two cases were not filed until May 1, 1985. Plaintiffs' motions for temporary restraining orders were not filed until May 3, 1985, only ten days ago.

This court has heard the testimony in both these cases and under the law is required to consider them on the basis of any other injunctive relief. The court notes that these cases are distinguishable from the supervisor redistricting cases which this court and other courts in this district heard in some numbers last year in that in all of the supervisor redistricting cases which this court heard it was admitted either in the pleadings by the defendants or upon the taking of the testimony that the supervisors districts were unconstitutionally malapportioned. In the instance of at large voting for alderman of cities, there is no per se discrimination as there is in violation of the one man-one vote matter that has previously been presented to this court in supervisor redistricting cases.

Because there is no per se discrimination under Section 2 of the Voting Rights Act, the matter of proof in this case must be presented by both sides and plaintiff has the burden of proving that there has been a violation of Section 2 of the Voting Rights Act.

The Court notes that the effective date of the Voting Rights Act amendment of 1982 was June 29, 1982. That is almost three years ago. The plaintiffs in these two suits only filed their suits on May 1, 1985, fourteen days before the municipal elections. The court in deciding these cases is required to investigate a number of factors which are generally referred to as the Zimmer factors, as reiterated in U. S. v. Marengo County Commission, decided by the Eleventh Circuit on May 14, 1984, reported in 731 F.2d 1546. This decision of the Eleventh Circuit refers to the Senate report in which the Zimmer factors are again set forth, which references are on Page 1565, Footnote 32.

Those factors are long and complicated, and it is not fair to the defendants in these cases to have to be put to the position of defending on those matters in this short time, particularly where the plaintiffs have slept on their rights for some three years now and even if the entire scope of the ramifications and rights of the parties under Section 2 of the

Voting Rights Act as amended were not clear because of judicial interpretation and other matters until after passage and the time the act took effect. Certainly three years is ample time to have filed suit well before two weeks before these elections are to be held.

The testimony is clear in both cases that the candidates have been campaigning for at least several weeks, if not several months, and Mr. Patterson, who testified in this case, says he had been campaigning for a year and he himself had expended funds for newspaper advertisements, as have other candidates in both Woodville and Centerville. It is obvious and the court can take notice of the fact that municipalities at this late date would have expended considerable sums in preparing for the elections to be held tomorrow by having ballots printed, organizing the election machinery, and other matters. The court feels that these cases have not been timely filed and that the temporary restraining order should be denied.

The court notes three cases in which injunctions were either granted or denied because of time situations, in all of which the suits were filed more than two weeks before. Those cases are Heggins v. Dallas, 469 F. Supp 739, 1979; Oden v. Brittain, United States Supreme Court case, 396 U. S. 1210, 1969; and Moore v. Leflore County Board of Election Commissioners, 351 F. Supp 848, 1971. The court does not reach the issue of whether or not there was a proper joinder of the election commissioners in regard to these cases as it is not necessary for the above reasons.The court furher notes that these two cases are unusual cases in that both cases involve black plaintiffs in towns having black populations in excess of 65 per cent. That figure has generally been taken by the courts of this circuit to represent a functional majority. In redistricting cases that figure has been the guideline for the courts in designing supervisors districts which would be considered districts in which black candidates would have a fair chance at electing members of their race. The court further notes that in all municipal elections, regardless of the type of municipal government, that mayors would be elected at large and under no circumstances should the mayors; elections in either of these towns be enjoined from proceeding on tomorrow.

Accordingly, for these reasons the court has considered the factors normally considered for injunctive relief. The court is of the opinion that the plaintiffs in both of these cases have failed to show that there is a probability of success on the merits for either of them. The plaintiffs have likewise failed to show the equities are in their favor. In regard to this, the plaintiffs slept on their rights, if they indeed have rights, and have allowed the candidate and the towns involved to proceed toward the elections and expend considerable sums in preparing for those elections. It simply would not be fair to all of the people, including the populations of Centerville and Woodville, to enjoin these elections at this time. The court realizes that we are dealing with voting rights and that under these circumstances the Constitutional rights of the parties are presumed; however, the court does not need to reach the remaining factors of the injunctive test for the reason that the plaintiffs have failed on the others.

This leaves us with a situation where the temporary restraining orders will be denied in both of these cases. For the information of the parties, it is the court's opinion that this ruling on the motions for temporary restraining orders would also control as to whether or not both the general elections should be allowed to proceed. Accordingly, the court will not set the matter for preliminary injunction prior to the general elections being held. Accordingly, the plaintiffs' cases will be brought on for hearing on permanent injunctive relief as those cases ripen on the docket of this court, unless adequate reason is shown otherwise.

The court has issued this oral ruling, and in the event it is transcribed will reserve the right to edit or amend this ruling. I will ask the attorneys for the defendants to prepare brief orders denying the motions for temporary injunctive relief and get them to the court. I presume that the representatives who are in the audience include members of the mayor and board of aldermen for the two towns of the cities of Centerville and Woodville, and that the word of this court's action can be disseminated in those towns, not only among people presently in office, but also through the plaintiffs and their attorneys, so that the towns will be adequately informed that the elections will proceed tomorrow as scheduled.

****

CERTIFICATE

I, David A. Scott, Official Court Reporter, United States District Court, Southern District of Mississippi, do hereby certify that the above and foregoing 7 pages contain a full, true, and correct transcript of the proceedings had in the aforenamed case at the time and place indicated, which proceedings were recorded by me to the best of my skill and ability.

I certify that the transcript fees and format comply with those prescribed by the Court and Judical Conference of the United States.

This the 26th day of May, 1987.

David A. Scott